2003-62

>>> "Keefe BROOKS" <BROOKS@butzel.com> 07/30/04 10:28AM >>>
Dear Supreme Court Clerk:

I am writing to address one issue regarding the proposed adoption of the new Michigan Rules of Professional Conduct.

As a member of the State Bar Ethics Committee for nearly 14 years, and chair of the Committee from 1996-1998, I am vitally interested in these matters. In addition, a significant portion of my practice concerns the defense of lawyers and law firms in professional negligence cases. It is the intersection of these fields that gives rise to my chief concern.

The text of proposed rule 1.0.2 is the substantially the same as current rule 1.0(b). In essence, they confirm the intent of the rules as not giving rise to a civil cause of action for damages for violation of a rule.

As the rules of professional conduct serve very different purposes than concepts of civil liability for breach of the standard of care, I very much support the text of this rule. Unfortunately, however, a handful of cases have held that violation of a rule may be "evidence" of breach of the standard of care. This concept has now been incorporated into the last sentence of paragraph [20] of the text of the Preamble, a comment that did not previously exist. These developments have the practical effect of completely emasculating the rule that breach of a rule does not give rise to a cause of action for damages.

I urge the Court to not only consider deleting this sentence, but to instead indicate, in clear and unmistakable language, that an alleged violation of the rules shall NOT be admissible in a civil action for professional negligence.

A claim for professional negligence requires proof of: 1) an attorney-client relationship; 2) breach of the standard of care; 3) proximate cause; and 4) damages. If proof of the second element, breach of the standard of care, may be satisfied by pointing to any violation of any Rule of Professional Conduct, since that is "evidence" of breach of the standard of care, we have in effect created a private right of action for violation of the Rules, contrary to the express provisions of current Rule 1.0(b) and proposed Rule 1.0.2.

I believe it is a serious mistake to confuse rules of conduct for disciplinary purposes with the standard of care for civil liability

purposes. While some of the rules of professional conduct are somewhat analogous to standard of care issues, like Rule 1.1 (Competence) and Rule 1.3 (Diligence), many of the rules have nothing to do with the standard of care. For example, technical rules like the deposit of client funds in interest-bearing accounts (Rule 1.15(d)(B)), rules about trial publicity (Rule 3.6), rules about communication with persons represented by counsel (Rule 4.2), respect for the rights of third persons (Rule 4.4), responsibilities regarding nonlawyer assistants (Rule 5.3), restrictions on the right to practice (Rule 5.6), Pro Bono service (Rule 6.1) and many others, while defining a standard of conduct, have absolutely nothing to do with the standard of care. Yet with a blanket statement that "violation of a Rule may be evidence of breach of the applicable standard of conduct" raises the specter of civil liability being imposed for technical violations of rules that in fact have absolutely nothing to do with the "standard of care."

Conversely, we can all probably agree that the standard of care requires that a lawyer be competent to handle matters accepted for representation and that a lawyer act diligently in fulfilling the goals of the representation. Any honest expert in a professional negligence action would readily concede that these are part of the standard of care. What then does it add to allow the expert to go on to cite to Rules 1.1 and 1.3 and opine that, not only did the lawyer breach the standard of care, but he/she also violated these rules of professional conduct? Stated another way, if and to the extent the rules are reflective of the standard of care, it adds nothing in a professional negligence case to point out that the lawyer might also have committed conduct that would subject the lawyer to potential disciplinary proceedings.

This is an area that can and does create a good deal of confusion in professional negligence cases. Under the recent case law and the proposed comment in paragraph [20] of the proposed Preamble, a lawyer who otherwise complies in all respects with the applicable standard of care in handling a matter for a client, might nevertheless be subject to suit because the lawyer engaged in impermissible pretrial publicity, had impermissible contact with a person represented by counsel, made discourteous remarks about a witness, etc. These rules exist for good reason; to hold lawyers to a standard of conduct befitting the profession. On the other hand, they have nothing to do with the standard of care. It does not make sense to subject lawyers to civil liability for violation of such rules and, moreover, stating that violation of a Rule does not give rise to a cause of action for damages, while at the same time stating that violation of a Rule nonetheless supplies the necessary "evidence" of a breach of the standard of care, is a distinction without a difference.

For these reasons, I urge the Court to expressly provide, in the text of Rule 1.0.2 or the Preamble, that a violation of these Rules shall NOT be admissible in a civil action for damages.

Thank you for your consideration.

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